

2009 JUL 27 AM 11:44

BEFORE THE FEDERAL ELECTION COMMISSION

CELA

In the Matter of

Fieger, Fieger, Kenney, Johnson and Giroux, P.C.

Geoffrey Nels Fieger

Vernon R. Johnson

)  
)  
)  
)  
)  
)

MUR 5818

GENERAL COUNSEL'S REPORT #2

1 I. ACTIONS RECOMMENDED

2 (1) Find probable cause to believe that Fieger, Fieger, Kenney, Johnson and  
3 Giroux, P.C. ("the Firm") knowingly and willfully violated 2 U.S.C. §§ 441b and 441f;  
4 (2) find probable cause to believe that Geoffrey Nels Fieger ("Fieger") knowingly and  
5 willfully violated 2 U.S.C. §§ 441a, 441b, and 441f; (3) find probable cause to believe  
6 that Vernon R. Johnson ("Johnson") knowingly and willfully violated 2 U.S.C. §§ 441b  
7 and 441f; \_\_\_\_\_

8 II. INTRODUCTION

9 The Commission previously found reason to believe that the Firm, Fieger, and  
10 Johnson (referred to collectively, hereinafter, as "Respondents") had each knowingly and  
11 willfully violated 2 U.S.C. §§ 441b and 441f by using corporate funds to reimburse  
12 contributions made in the name of another to John Edwards for President ("the Edwards  
13 Committee" or "the Committee"). See MUR 5818 Factual and Legal Analyses.

14 The results of the ensuing investigation are fully set forth in the General  
15 Counsel's Brief served upon Respondents on June 5, 2009, which is hereby incorporated  
16 by reference ("GC Brief"). Respondents' June 24, 2009 Reply Brief ("Reply Brief")  
17 does not dispute that the Firm's corporate funds were used to reimburse \$113,000 in

2904425379

1 contributions made to the Edwards Committee (55 contributions of the maximum \$2,000  
2 and two contributions of \$1,500). Respondents also do not dispute that Fieger used  
3 personal funds to reimburse another \$18,000 in contributions made to the Edwards  
4 Committee (nine contributions of the maximum \$2,000). *See* Chart attached to GC Brief.  
5 Finally, the Reply Brief does not dispute that Respondents were put on notice as to the  
6 illegality of their actions, or that they attempted to conceal and falsely deny that there had  
7 been reimbursements.

8       These undisputed facts establish violations of 2 U.S.C. §§ 441b and 441f for  
9 contributions reimbursed with the Firm's corporate funds and violations of 2 U.S.C. §§  
10 441a and 441f for the contributions reimbursed with Fieger's personal funds. Further, as  
11 set forth in the GC Brief, notwithstanding the acquittals in the criminal case, which was  
12 subject to a substantially higher standard of proof, there is persuasive evidence that  
13 Respondents knowingly and willfully violated the Act.

14       Respondents rely on a recent federal district court Order in *United States v.*  
15 *O'Donnell*, No. CR 08-00872 (C.D. Cal. June 8, 2009), currently on appeal to the Ninth  
16 Circuit, to argue that Section 441f does not prohibit the reimbursement of contributions.  
17 The Reply Brief did not make any specific argument as to why Respondents did not  
18 violate Section 441a (for excessive contributions reimbursed with Fieger's funds) and  
19 Section 441b (for prohibited corporate contributions reimbursed with the Firm's funds).  
20 Respondents further argue that the criminal prosecution, which ended with the acquittal  
21 of both Fieger and Johnson, *see United States v. Fieger*, No. 07-20414, 2008 WL 996401

2904425380

(E.D. Mich. June 2, 2008) (discussed in the GC Brief at 2-3), mandates that the Commission take no further action and close the file.

On July 14, 2009, the Commission held a Probable Cause hearing ("PC hearing") pursuant to 72 Fed. Reg. 64,919 (Nov. 19, 2007), at which Respondents' counsel presented arguments and responded to questioning from the Commission. *See* PC hearing transcript. At the hearing, Respondents' counsel argued that Section 441f does not prohibit reimbursements, and that because Section 441f does not prohibit reimbursements, there is no need to examine Sections 441a and 441b. At the Commission's invitation, Respondents made a supplemental submission regarding prior court decisions on civil enforcement of Section 441f that were cited in their Reply Brief. *See* Respondents' Supplemental Brief, dated July 21, 2009.

For the reasons discussed below, we recommend that the Commission find probable cause to believe that the Firm knowingly and willfully violated 2 U.S.C. §§ 441b and 441f, that Geoffrey Nels Fieger knowingly and willfully violated 2 U.S.C. §§ 441a, 441b, and 441f, and that Vernon R. Johnson knowingly and willfully violated 2 U.S.C. §§ 441b and 441f.

### **III. LEGAL ANALYSIS**

The Commission should find probable cause to believe that Respondents knowingly and willfully violated the Act, because the facts are undisputed and, notwithstanding Respondents' arguments, the law is clear. The Reply Brief does not dispute any of the material facts set forth in the GC Brief. Specifically, it is undisputed

29044253381

1 that: 1) Respondents used both the Firm's corporate funds and Fieger's personal funds to  
2 reimburse numerous contributions to the Edwards Committee, 2) Respondents were on  
3 notice, from various sources including the Edwards Committee and certain potential  
4 conduits, that their actions would be in violation of law, 3) Respondents both attempted  
5 to conceal and falsely deny the fact that contributions had been reimbursed; and 4)  
6 Respondents refused to provide the Commission with information under their exclusive  
7 control by broadly asserting their Fifth Amendment privilege, even after the criminal  
8 acquittal of Fieger and Johnson removed any threat of criminal prosecution.

9 Both Congress and the Commission have recognized that contributions in the  
10 name of another are some of the most serious violations of the Act. These violations  
11 conceal the true source of prohibited and excessive contributions and cause political  
12 committees to file false disclosure reports with the Commission. Such activity strikes at  
13 the heart of the Act's purpose, in that it deprives the public of accurate information as to  
14 the identity of contributors, and allows the true source of such funds to circumvent  
15 applicable limitations and prohibitions. In raising the penalties for violations of Section  
16 441f as part of the 2002 BCRA Amendments, Congress recognized that this type of  
17 violation represents a serious threat to the integrity of campaign finance laws  
18 administered and enforced by the Commission.

19 This matter represents one of the largest Section 441f violations in the  
20 Commission's history. The fact that Respondents were able to escape criminal penalties  
21 makes it even more important that the Commission address these serious violations and  
22 deter similar future violations by seeking appropriate civil penalties in this matter.

29044253382

We address below each of Respondents' legal arguments that: 1) the district court ruling in *O'Donnell*, No. CR 08-00872 (C.D. Cal. June 8, 2009) establishes that Section 441f does not prohibit reimbursements of contributions; 2) there is no need to address the alleged violations of Sections 441a and 441b; and 3) the acquittal in the criminal trial should have ended the enforcement proceedings.

**A. Violations of Section 441f**

Respondents' primary argument is that Section 441f does not prohibit the reimbursement of contributions. Respondents argue that because Section 441f does not use the terms "reimburse" or "conduit," and because Section 441a(a)(8) authorizes certain types of conduit contributions, Section 441f only prohibits the use of false names (or names used without the knowledge of the named donor), and does not reach contributions made in the name of another through conduits. Reply Brief at 2; PC Hearing Tr. at 9-12; 41. To support this position, Respondents cite a recent Order from a California federal district court, which currently is on appeal to the Ninth Circuit, which was issued after this Office served the GC Brief. See *O'Donnell*, No. CR 08-00872 (C.D. Cal. June 8, 2009).

As discussed below, Respondents' interpretation of Section 441f is contrary to well-established legal authority and is based on a flawed understanding of the statutory scheme; and the lone district court Order supporting their position is unlikely to be upheld on appeal.

**1. Section 441f Prohibits Making Contributions Made in the Name of Another Through the Reimbursement of Conduits**

Section 441f provides that,

29044253383

1           No person shall make a contribution in the name of another person  
2           or knowingly permit his name to be used to effect such a  
3           contribution and no person shall knowingly accept a contribution  
4           made by one person in the name of another person.

5   GC Brief at 10-11.

6           Although there is little legislative history on the adoption of Section 441f, the  
7   House floor debate on an amendment of the Federal Election Campaign Act in 1976 to  
8   raise the limit on cash contributions included an exchange as to whether there would be a  
9   reporting obligation if one person, whose own cash contribution exceeded the limit, gave  
10   another individual cash to purchase a ticket to a fundraiser. In response, Rep. Mathis  
11   stated, "I think that the gentleman knows that there is a provision in the law that provides  
12   for criminal penalties for using another as a conduit for funds. One cannot give money  
13   for another."<sup>1</sup> House Floor Debate on H.R. 12,406, *reprinted in* LEGISLATIVE HISTORY  
14   OF FEDERAL ELECTION CAMPAIGN ACT AMENDMENTS OF 1976, at 936 (1977).

15           In 1977, the Commission promulgated implementing regulations with concrete  
16   examples of "contribution in the name of another," that include:

- 17           (i)     Giving money or anything of value, all or part of which  
18                    was provided to the contributor by another person (the true  
19                    contributor) without disclosing the source of money or the  
20                    thing of value to the recipient candidate or committee at the  
21                    time the contribution is made, or  
22  
23           (ii)    Making a contribution of money or anything of value and  
24                    attributing as the source of the money or thing of value  
25                    another person when in fact the contributor is the source.

---

<sup>1</sup> Although Rep. Mathis did not identify the specific provision that imposed criminal penalties for conduit contributions, the fact that Section 441a already recognizes that indirect contributions can be made through conduit so long as the contribution is accurately attributed and reported, coupled with his precise language that "One cannot give money for another," suggests he was pointing to Section 441f.

1 11 C.F.R. § 110.4(b)(2)(i)-(ii).<sup>2</sup> These regulations were transmitted to Congress in 1977  
2 and were subject to a legislative veto. Congress, which had recently amended the Act,  
3 did not exercise its veto authority. Consistent with the implementing regulations, the  
4 Commission has applied Section 441f's prohibition to reimbursed conduit contributions  
5 in both Advisory Opinions and enforcement proceedings. *See, e.g.*, AO 1996-33  
6 (Colantuono for Congress); 1986-41 (Air Transport); 1989-05 (Ray) and MURs 4818  
7 (Roberts for Congress); 5666 (MZM, Inc.); 4931 (Audiovox, Inc. et al.).

8 In 2002, Congress approved enhanced criminal and civil penalties for violations  
9 of Section 441f, and referred to such violations as the "Conduit Contribution Ban."  
10 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 315, 116 Stat. 108  
11 (2002) (codified as amended at 2 U.S.C. § 437g(d) (2002)). The amended statute,  
12 entitled "Sec. 315. Increase in Penalties Imposed for Violation of Conduit Contribution  
13 Ban," increased the maximum civil penalty that can be assessed by the Commission for a  
14 violation of the conduit contribution prohibition in Section 441f. § 315, 116 Stat. at 108  
15 (emphasis added).<sup>3</sup>

16 Thus, the conclusion that Section 441f covers the reimbursement of conduits is  
17 supported by the language of the statute, the original legislative history, the  
18 Commission's implementing regulations, subsequent Commission Advisory Opinions

---

<sup>2</sup> The regulation was amended in 1989 and again after BCRA in 2002.

<sup>3</sup> The amended statute also increases the maximum term of imprisonment for a criminal violation of the conduit contribution ban involving amounts of between \$10,000 and \$25,000 from one to two years, and increases the maximum criminal penalty to the greater of \$50,000 or 1,000 percent of the amount involved. § 315, 116 Stat. at 108.

1 and enforcement actions, and the 2002 BCRA legislative history which enhanced the  
2 penalties for reimbursed conduit contributions.

3 **2. Federal Courts Have Held That Section 441f Prohibits**  
4 **Reimbursements of Contributions**

5 The Commission's long-standing interpretation of the statute is consistent with  
6 the long-standing interpretation of the statute by the federal courts, which have  
7 recognized that Section 441f prohibits contributions made in the name of another through  
8 conduits. In *McConnell v. FEC*, 540 U.S. 93, 232 (2003), the Supreme Court rejected the  
9 government's argument that a provision to ban contributions by minor children was  
10 needed to prevent "corruption by conduit; that is, donation by minor children to  
11 circumvent contribution limits applicable to the parents," which would violate the  
12 prohibition of any person from "'mak[ing] a contribution in the name of another person'"  
13 or "'knowingly accept[ing] a contribution made by one person in the name of another.'" *Id.*  
14 (quoting 2 U.S.C. § 441f) (emphasis added).

15 Similarly, the Third Circuit upheld the rejection of a constitutional challenge to  
16 Section 441f in *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000) (in upholding  
17 the district court's rejection of a constitutional challenge to Section 441f, the court noted  
18 the statute's "[p]roscription of conduit contributions"). The Court of Appeals for the  
19 District of Columbia, in describing a scheme to reimburse contributions cited Section  
20 441f and noted that "no one may make a campaign contribution in the name of another  
21 person." *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 969 (D.C.  
22 Cir. 19998). Finally, the Ninth Circuit stated, Section 441f prohibits "the use of

2904425386



1 'conduits' to circumvent these restrictions," in affirming dismissal of a First Amendment  
2 challenge to the statute. *Goland v. United States*, 903 F.2d 1247, 1251 (9<sup>th</sup> Cir. 1990).

3 Further, contrary to Respondents' assertion that *O'Donnell* is the only federal case  
4 that directly addressed the application of Section 441f to reimbursement schemes, the  
5 Commission has obtained orders from multiple federal district courts applying Section  
6 441f to the reimbursement of conduit contributions. For example, in *FEC v. Weinstein*,  
7 462 F. Supp. 243 (S.D.N.Y. 1978), a federal district court found the use of corporate  
8 funds to reimburse employees for contributions to a 1976 Presidential primary campaign  
9 violated Section 441f. The court rejected the argument that Section 441f was  
10 unconstitutionally vague, and found that by reimbursing the conduit employees for their  
11 contributions, the defendant had not complied with the "simple words" prohibiting  
12 making contributions in the name of another. *Weinstein*, 462 F. Supp. at 250. Likewise,  
13 in *FEC v. Williams*, No. CV 93-6321-ER (BX) (C.D. Cal. Jan. 31, 1995), *rev'd on other*  
14 *grounds* (statute of limitations), 104 F.3d 237 (9<sup>th</sup> Cir. 1996), *cert. denied* 118 S. Ct. 600  
15 (1997), the same district court that issued the *O'Donnell* Order found defendant violated  
16 Section 441f by advancing or reimbursing \$1,000 to twenty-two contributors who made  
17 contributions at his request to Jack Kemp's presidential campaign.

18 The Commission invited Respondents to address *Weinstein* and *Williams* in a  
19 supplemental brief. Respondents assert in their supplemental brief that *Weinstein* is  
20 distinguishable from *O'Donnell* because it "did not address, at all, whether § 441f  
21 prohibits reimbursement," but simply addresses the issue of whether Section 441f is  
22 unconstitutionally vague. Resp. Supp. Br. at 4. This is incorrect. The *Weinstein* court

29044253387

1 held that the reimbursement of conduits violated the "simple words" of Section 441f. *See*  
2 462 F. Supp. at 249-50. Respondents also erroneously characterize *Williams* as "a one-  
3 sentence, conclusory opinion, its jurisprudential value is dubious, to say the least." Resp.  
4 Supp. Br. at 3. In fact, the five-page *Williams* opinion clearly rules that the defendant's  
5 conduct "in either advancing or reimbursing the \$1,000 to the 22 individuals" violates  
6 Section 441f. *Williams*, No. CV 93-6321-ER (BX) (C.D. Cal. Jan. 31, 1995) at 4.  
7 Respondents are incorrect to conclude that the absence of a lengthy analysis deprives  
8 these decisions of persuasive legal authority. *See* Resp. Supp. Br. at 3-5. Unlike  
9 *O'Donnell*, which is currently on appeal, these are final decisions applying Section 441f  
10 to reimbursement schemes.

11 In addition, the Commission has obtained at least six other rulings from federal  
12 courts that found reimbursements in violation of Section 441f:

- 13 • In *FEC v. Orton*, No. 95-977W (D. Utah April 28, 1997), the U.S. District  
14 Court for the District of Utah, Central Division approved a settlement stating  
15 that Utahans for Ethical Government, a single candidate political committee  
16 supporting William Orton, had violated Section 441f by accepting  
17 contributions made in the name of another when a corporation reimbursed  
18 contributions made to it in the names of two individuals associated with the  
19 corporation.
- 20 • In *FEC v. Kopko*, Civil Action No. 91-CV-7764 (E.D. Pa. June 8, 1992), the  
21 U.S. District Court for the Eastern District of Pennsylvania declared that  
22 Edward Kopko violated Section 441f by reimbursing twelve of his relatives  
23 and friends for their \$250 checks to Alexander Haig's 1988 Presidential  
24 campaign. The court ordered Kopko to pay a civil penalty and permanently  
25 enjoined him from violating Section 441f.
- 26 • In *FEC v. Lawson*, Civ. Action No. 6:90-2116-9 (D. S.C. April 8, 1991), the  
27 U.S. District Court for South Carolina, Greenville Division, granted the  
28 Commission's motion for default judgment and found that Mark Lawson  
29 knowingly permitted his name to be used to make a contribution in the name  
30 of another in violation of 2 U.S.C. § 441f when he received a \$1,500 bonus  
31 from his employer, Robin's Mens Store, in order to make a contribution two

29044253388

1 days later to the House campaign of Robin Tallon, Jr. The Court decreed that  
2 Mr. Lawson had violated Section 441f, ordered him to pay a penalty, and  
3 enjoined Mr. Lawson from future violations of Section 441f.

4 • In *FEC v. Rodriguez*, Civil Action No. 86-687-CIV-T-10, (M.D. Fla. Nov. 12,  
5 1988), the U.S. District Court for the Middle District of Florida, Tampa  
6 Division, found that Cesar Rodriguez had violated Section 441f by assisting in  
7 making contributions in the name of another to the Carter/Mondale  
8 Presidential Committee when, using funds provided by Allen Wolfson, he  
9 solicited and reimbursed contributions made in the names of various conduit  
10 contributors.

11 • In *FEC v. Wolfson*, Civil Action No. 85-1617-CIV-T-13 (M.D. Fla. February  
12 6, 1986), the U.S. District Court for the Middle District of Florida, Tampa  
13 Division, found that Mr. Allen Z. Wolfson violated Section 441f by making  
14 contributions in the name of another when he reimbursed contributors for  
15 various \$1,000 contributions to Carter/Mondale Presidential Committee and a  
16 congressional campaign committee. The court imposed a \$52,000 civil  
17 penalty, and enjoined further violations.

18 • In *FEC v. Nick Mastorelli Campaign Fund*, Civil Action No. 82-0774F (D.  
19 N.J. March 28, 1983), the U.S. District Court for the District of New Jersey  
20 decreed that various individual contributors had violated Section 441f when  
21 they made contributions in the name of another by reimbursing other persons  
22 for their contributions to the Mastorelli congressional campaign.

23 Finally, Respondents ignore that during their own criminal trial, the district court  
24 ruled in favor of a government motion *in limine* that precluded Respondents from arguing  
25 or presenting evidence as to whether the reimbursement of contributions violates sections  
26 441f or 441b and, further, from arguing the constitutionality of those provisions. *United*  
27 *States v. Fieger*, No. 07-20414, 2008 WL 996401, at \*3 (E.D. Mich. April 8, 2008). That  
28 district court also noted that it had already addressed, and subsequently rejected, those  
29 arguments when it ruled on Respondents' previous motion to dismiss. *Id.* Jury  
30 Instruction #19 from the criminal trial reflects that ruling, stating, "The Court has ruled  
31 that sections 441(b) and 441(f) prohibit reimbursements by an individual or a corporation  
32 of federal campaign contributions."

29044253389

**3. The *O'Donnell* Analysis Is Flawed**

Despite the plain meaning of the language in the statute, the legislative history, and the long-standing interpretation and application of the statute by the Commission and the federal courts, *United States v. O'Donnell*, No. CR 08-00872 (C.D. Cal. June 8, 2009) reached a different conclusion that is inconsistent with the aforementioned authority interpreting Section 441f. The mistakes in the *O'Donnell* Order, which are being brought to the attention of the Ninth Circuit in the pending appeal, are summarized below.

A central piece of the *O'Donnell* ruling is the mistaken rationale that a prohibition of "conduit" contributions by Section 441f would be inconsistent with the apparent authorization of, and reporting requirements for, conduit contributions by other sections of the Act and Commission regulations. *O'Donnell* fails to recognize that Section 441f does not prohibit contributions made through conduits that are properly disclosed pursuant to Section 441a(a)(8). Section 441f states that it is illegal to make "contributions in the name of another." What is prohibited by Section 441f is not the fact that a conduit is used, but that the conduit is used in a manner that disguises the true source of the funds.

Section 441a(a)(8) and Commission regulations at 11 C.F.R. § 110.6 provide for situations where a donor sends their contribution to a candidate or political committee through a conduit or intermediary, and that contribution is accurately attributed to the name of the actual donor with an additional disclosure as to the role of the conduit. Such contributions are entirely legal if the conduit or intermediary accurately reports the name of the original contributor, as well as their own role in forwarding the contribution, and

2904425390

1 that the funds otherwise comply with the limits and prohibitions of the Act. In certain  
2 instances, a contribution actually may be attributed to both the donor and the conduit.  
3 See 11 C.F.R. § 110.6.

4 By contrast, a conduit contribution violates Section 441f if the identity of the true  
5 source of the funds is concealed when the actual donor either advances or reimburses the  
6 "straw donor" or conduit for the amount of the contribution and the recipient committee  
7 never learns or reports the true source of the funds. 11 C.F.R. § 110.4(b)(2)(i)-(ii). The  
8 *O'Donnell* court did not understand this distinction.

9 Another rationale offered in *O'Donnell* for limiting the scope of Section 441f to  
10 only prohibiting the use of false names (or names used without the knowledge of the  
11 named donor) is the absence of the words, "directly or indirectly" and/or "including  
12 contributions which were earmarked or otherwise directed through an intermediary or  
13 conduit," that are used in other sections of the Act. The Court noted that Congress was  
14 unambiguous when it explicitly addressed direct and indirect contributions under  
15 Sections 441a, 441b, and 441e. Those sections, however, are all broad prohibitions on  
16 contributions from particular sources that are capable of being violated by a wide variety  
17 of both direct and indirect means. Section 441f, by contrast, is a specific prohibition on  
18 disguising the source by making a contribution in the name of another, which is a  
19 particular means of circumventing other restrictions. In other words, the conduct  
20 prohibited by Section 441f is inherently indirect, obviating the need for  
21 "directly/indirectly" language. Thus, the omission of words found in the broader

2904425391

1 provisions of Sections 441a, 441b, and 441e is not inconsistent with 441f reaching  
2 contributions in the name of another made through conduits.

3 *O'Donnell* also mischaracterizes the floor debate from the CONGRESSIONAL  
4 RECORD that it cites in the Order by concluding that because a single legislative member  
5 did not recognize the proposed legislation included prohibitions against conduit  
6 contributions, the predecessor to Section 441f was not meant to prohibit such  
7 contributions. *See O'Donnell*, No. CR 08-00872 SJO (C.D. Cal. June 8, 2009) (citing  
8 117 Cong. Rec. 29,295 (1971) (statement of Sen. Scott) and 117 Cong. Rec. 43, 381  
9 (1971) (statement of Sen. Hayes)). *O'Donnell* misconstrues an isolated exchange during  
10 the FECA floor debate on the benefits of expanding the coverage for provisions of the  
11 FECA other than 441f to draw an unjustified inference that Section 441f does not prohibit  
12 contributions in the name of another made through a conduit. The effort to expand other  
13 provisions to overlap with prohibitions of Section 441f does not necessarily limit the  
14 scope of what is prohibited by the ban on contributions made in the name of another.

15 Based on its flawed reading of the statutory language and its failure to consider  
16 the factors discussed above, *O'Donnell* relied on *Chevron U.S.A., Inc. v. Natural Res.*  
17 *Def. Council*, 467 U.S. 837 (1984) to reject the Commission's regulations, advisory  
18 opinions and enforcement actions that hold Section 441f reaches the use of conduits to  
19 make contributions in the name of another. The court's conclusion regarding the  
20 deference owed to the Commission is undermined by the flaws in that analysis discussed  
21 above. In fact, the Commission is precisely the type of agency to which deference should  
22 be presumptively afforded. *See United States v. Kanchanalak, et al.*, 192 F.3d 1037

29044253392

(D.C. 1999), *DSCC v. FEC*, 454 U.S. 27 (1981). The Commission consistently has construed the plain language of Section 441f to reach contributions made in the name of another through conduits. "[U]nder [*Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)], courts are bound to uphold an agency interpretation as long as it is reasonable — regardless whether there may be other reasonable, or even more reasonable, views." *FEC v. National Rifle Ass'n*, 254 F.3d 173, 187 (D.C. Cir. 2001).

#### 4. Summary

Respondents' interpretation of Section 441f is contrary to the plain meaning of the statute and well-established legal authority and is based on a flawed understanding of the statutory scheme. As noted above, the language of the statute, legislative history, the implementing regulations, and subsequent court decisions establish that conduit contributions are covered by Section 441f if the money used by the conduit to make the contribution is not his or her own. Moreover, the *O'Donnell* Order has no precedential value and is unlikely to be upheld on appeal because (1) it mistakenly assumes Section 441f prohibits all conduit contributions, including those reported under Section 441a(a)(8); (2) its analysis that the statutory construction of Section 441f is inconsistent with other provisions of the Act that explicitly identify "direct or indirect" contributions fails to realize that all "contribution in the name of another" are inherently indirect; and (3) it projects its own interpretation of the statute to the congressional floor debate it cites to support the conclusion that Section 441f does not prohibit the reimbursement of conduit contributions.

29044253393

**B. Violations of Sections 441a and 441b**

As explained in the GC Brief, in addition to violating Section 441f, Respondents violated Sections 441a and 441b. See GC Brief at pp. 10-11. The Reply Brief does not address the violation of Sections 441a and 441b. At the probable cause hearing, in response to a question from the Commission, Respondents' counsel argued that Section 441f operates as a type of threshold issue, and that once it is determined that reimbursements are not prohibited under Section 441f, the Commission should not address whether there had been any violation of Sections 441a and 441b. PC Hearing Tr. at 22-23; 36-37. Respondents offered no legal authority for this view, which is incorrect as a matter of law.

Fieger, who was the true source for the \$18,000 in contributions reimbursed with his personal funds, exceeded the \$2,000 limit established by Section 441a(a)(1). These were his contributions and they exceeded the applicable limit by \$16,000. The statutory language of Section 441a covers "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate, shall be treated as contributions from such person to such candidate." See Section 441a(a)(8) (emphasis added). Accordingly, Fieger's use of personal funds to reimburse conduits violated Section 441a in that he made indirect contributions directed through an intermediary or conduit in excess of his applicable limit.

The Firm was the true source for an additional \$113,000 in contributions. These were the Firm's contributions, which therefore violated the ban on corporate

29044253394



1 contributions established by Section 441b. The statutory language of Section 441b  
2 explicitly states that the ban on corporate contributions and expenditures "includes any  
3 direct or *indirect* payment, distribution, loan advance, deposit, or gift of money, or any  
4 services or anything of value, . . . to any candidate, campaign committee, or political  
5 party or organization, in connection with any election to any of the offices referred to in  
6 this section . . ." See Section 441b(b)(2) (emphasis added) and *O'Donnell*, No. CR 08-  
7 00872 SJO (C.D. Cal. June 8, 2009) at 3. Thus, the Firm's use of corporate funds to  
8 reimburse conduits violated Section 441b in that it made indirect payments that  
9 constituted prohibited corporate contributions. In addition, Fieger and Johnson violated  
10 Section 441b by consenting to the use of corporate funds for these contributions. 2  
11 U.S.C. § 441b(b)(2).

12 The limits and prohibitions in Sections 441a and 441b are independent of both  
13 one another and Section 441f. Given the true source of these funds used for these  
14 contributions, Fieger violated Section 441a in connection with the contributions that  
15 came from his personal funds and all of the Respondents violated Section 441b in  
16 connection with the contributions that came from corporate funds. This conclusion is  
17 unavoidable without regard to whether Section 441f independently prohibits the  
18 reimbursement of contributions. Even the *O'Donnell Order* (whose view of Section 441f  
19 is incorrect and will very likely be reversed by the Ninth Circuit) acknowledges that  
20 Sections 441a and 441b would still prohibit the indirect excessive or prohibited  
21 contributions made in this matter. See *O'Donnell*, No. CR 08-00872 SJO (C.D. Cal. June  
22 8, 2009).

29044253395

**C. Impact of Criminal Acquittal**

In their Reply Brief and at the PC hearing, Respondents argued that the acquittal of Fieger and Johnson in the criminal trial should have ended all proceedings, civil and criminal, relating to the Edwards Committee contributions. Respondents, however, did not provide any legal authority to support this claim.<sup>4</sup> Further, the criminal trial defense was based solely on the lack of a knowing and willful mens rea, and did not involve the question of non-knowing and willful violations of Sections 441b and 441f or any violations of Section 441a.

Even as to the knowing and willful aspect of the case, Respondents' argument that the Commission should defer to the acquittal in the criminal proceeding has no legal basis. First, like many statutes, the Act contains both civil and criminal penalties and the statutory language supports the fact that there can be concurrent civil and criminal investigations. Under the Act, "The Commission shall have exclusive jurisdiction with respect to the civil enforcement of [the Act]." 2 U.S.C. § 437c(b)(1) (emphasis added). See 2 U.S.C. § 437 g(d)(1) (noting criminal penalties for violations of FECA). Accordingly, the results of a parallel criminal case have no bearing on how the Commission determines to exercise its exclusive civil jurisdiction.

---

<sup>4</sup> When asked at the probable cause hearing, Respondents' counsel acknowledged his clients were not arguing that civil enforcement by the Commission was precluded by the doctrine of double jeopardy. Double jeopardy only precludes future criminal, rather than civil, proceedings or penalties. See *Hudson v. United States*, 522 U.S. 93 (1997) (affirming that only criminal proceedings and penalties are precluded by an earlier criminal acquittal or convictions, and abrogating portions of *United States v. Halper*, 490 U.S. 435 (1989), which had held that under some circumstances disproportionately punitive non-criminal sanctions that were not criminal in nature could be considered quasi-criminal for purposes of applying the doctrine of double jeopardy).

1           An acquittal in a criminal proceeding does not preclude a subsequent civil  
2 proceeding. In *One Lot Emerald Cut Stones and One Ring v. U.S.*, 409 U.S. 232, 235  
3 (1972), the Supreme Court held that because a criminal trial has a greater burden of  
4 proof, acquittal in a criminal proceeding does not preclude a factual matter from being  
5 relitigated in a later civil proceeding as the criminal acquittal "does not constitute an  
6 adjudication on preponderance-of-the-evidence burden applicable in civil proceedings."  
7 See also *United States v. Dunn*, 802 F.2d 646 (2d Cir. 1986) (stating "it was not the intent  
8 of Congress that the remedies of criminal and civil forfeiture be mutually exclusive," thus  
9 allowing the government to prosecute a civil forfeiture despite an earlier unsuccessful  
10 criminal forfeiture).

11           Federal courts have also found that despite the acquittal or conviction of criminal  
12 charges, federal regulatory agencies may pursue civil proceedings relating to the same  
13 events. See, e.g., *Torrington Extend-A-Care Employee Ass'n v. N.L.R.B.*, 17 F.3d 580 (2d  
14 Cir. 1994) (earlier acquittal of a nursing home administrator on criminal assault charges  
15 against an employee did not preclude the National Labor Relations Board from pursuing  
16 civil penalties); *S.E.C. v. Ridenour*, 913 F.2d 515 (8<sup>th</sup> Cir. 1990) (finding an acquittal on  
17 criminal tax charges did not entitle the defendant to collateral estoppel in a subsequent  
18 civil securities trial). Indeed, a well-established rule of evidence states that criminal  
19 acquittals (based on a higher standard of proof) generally are not admissible as evidence  
20 in subsequent parallel civil proceedings. See *American Home Assur. Co. v. Sunshine*  
21 *Supermarket, Inc.*, 753 F.2d 321 (3d Cir. 1985) (stating "evidence of an acquittal in a  
22 criminal arson case is inadmissible in a civil arson case"). Accordingly, despite the

2904425397

1 criminal acquittal, the Commission may legally pursue Respondents for knowing and  
2 willful violations of the Act.

3 Not only may the Commission pursue the Respondents for knowing and willful  
4 violations of the Act, but there are compelling reasons to do so. This matter, which  
5 involves \$131,000 in illegal contributions, represents one of the largest Section 441f  
6 violations in the Commission's history. Respondents were experienced political actors,  
7 who received multiple warnings as to the illegality of their actions, but still proceeded to  
8 violate the Act, and later concealed and falsely denied that there had been  
9 reimbursements. See GC Brief at 12-21. As noted above, contributions in the name of  
10 another are some of the most serious violations of the Act. The fact that Respondents  
11 were able to avoid criminal penalties for their actions only increases the need for the  
12 Commission to vindicate the statute by pursuing serious violations of the Act that are  
13 present in this matter. Failure to proceed in the face of such large knowing and willful  
14 violations would signal that the Commission questions its own concurrent jurisdiction  
15 over the knowing and willful violations of the FECA, but, more importantly, leave  
16 serious violations unaddressed, some that were not even at issue in the criminal trial.  
17 Finally, Respondents' attempts to conceal the true identity of the contributors strike at the  
18 heart of the Act's purpose, which the Supreme Court noted in the seminal campaign  
19 finance case of *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), as "the prevention of corruption  
20 and the appearance of corruption spawned by the real or imagined coercive influence of  
21 large financial contributions."

2904425398

29044253399

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18

29044253400

1

2 **VI. GENERAL COUNSEL'S RECOMMENDATION**

- 3 1. Find probable cause to believe that Fieger, Fieger, Kenney, Johnson and  
4 Giroux, P.C. knowingly and willfully violated 2 U.S.C. § 441b.
- 5 2. Find probable cause to believe that Fieger, Fieger, Kenney, Johnson and  
6 Giroux, P.C. knowingly and willfully violated 2 U.S.C. § 441f.
- 7 3. Find probable cause to believe that Geoffrey Nels Fieger knowingly and  
8 willfully violated 2 U.S.C. § 441a.
- 9 4. Find probable cause to believe that Geoffrey Nels Fieger knowingly and  
10 willfully violated 2 U.S.C. § 441b.
- 11 5. Find probable cause to believe that Geoffrey Nels Fieger knowingly and  
12 willfully violated 2 U.S.C. § 441f.
- 13 6. Find probable cause to believe that Vernon R. Johnson knowingly and  
14 willfully violated 2 U.S.C. § 441b.
- 15 7. Find probable cause to believe that Vernon R. Johnson knowingly and  
16 willfully violated 2 U.S.C. § 441f.
- 17 8. Approve the attached conciliation agreement.
- 18
- 19

7/24/09  
Date

*Thomasenia P. Duncan/8y*  
Thomasenia P. Duncan  
General Counsel **AMT**

*[Signature]*  
Ann Marie Terzaken  
Associate General Counsel for Enforcement

29044253401

MUR 5818

General Counsel's Report #2

Fieger, Fieger, Kenney, Johnson and Giroux, P.C., et al.

Page 24 of 24



Mark Shonkwiler

Assistant General Counsel for Enforcement



Phillip A. Olaya  
Attorney

29044253402